APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. CHARLES KING, Defendant-Appellant.	No. 71-1256
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. MANUEL RODRIGUEZ, Defendant-Appellant.	No. 71-1088
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ROBERT BUTLER, Defendant-Appellant.	No. 71-1029
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. TED DEAN BUTLER, Defendant-Appellant.	No. 71-1030
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. VINCENT ARIAS, Defendant-Appellant.	No. 71-1031

Appeal From the United States District Court
For the Central District of California

Before: BARNES, ELY and WALLACE, Circuit Judges

WALLACE, Circuit Judge:

Appellants Robert Butler and Ted Dean Butler (unrelated) were charged both with conspiracy to possess for sale and to sell dangerous drugs (amphetamine tablets and barbiturate capsules) in violation of 21 U.S.C. § 331(q) and 18 U.S.C. § 371, and with conspiracy to conceal, transport and sell heroin, in violation of 21 U.S.C. § 174 and 18 U.S.C. § 371. Appellants Vincent Arias, Manuel Rodriguez and Charles King were charged only in the conspiracy to possess for sale and to sell dangerous drugs.

The trial court, after defense motions, severed the trial on the dangerous drug count from the trial on the count relating to heroin. The jury returned a guilty verdict as to each defendant at the conclusion of both trials. Appellants together charge sixty-two errors in this appeal.

TRIAL OF THE BUTLERS ON THE HEROIN COUNT

The Butlers allege error of constitutional dimensions based upon the introduction into evidence of various taped telephone conversations that took place between them and John Durden, a cooperating, unindicted co-conspirator.[1] With Durden's consent, the recordings were made by connecting his telephone with a tape recorder. There is no error. In *United States v. White,* 401 U.S. 745 (1971), the Supreme Court approved the testimony of government agents who

related warrantless electronically monitored conversations between the defendant and a consenting informat, and stated that the Fourth Amendment ". . . affords no protection to 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'" 401 U.S. at 749. See also *Hoffa v. United States,* 385 U.S. 293 (1966); *Lewis v. United States,* 385 U.S. 206 (1966); *Lopez v. United States,* 373 U.S. 427, 438-39 (1963).

The Butlers further contend that their rights to counsel and to be free from self-incrimination were violated by the unseen and unheard monitoring of their conversations. They present the interesting argument that, since Durden was calling them at the request of government narcotics agents, they had a right to be warned of their right to counsel before they spoke, citing *Massiah v. United States,* 377 U.S. 201 (1964) and *Escobedo v. Illinois,* 378 U.S. 478 (1964). Appellents have failed to appreciate the rationale of the holdings in those cases. At the time of the recorded telephone calls, appellants had not been indicted and were not represented by counsel as in *Massiah;* nor are the facts of this case comparable with *Escobedo* where the investigation had reached the "accusatory" phase, the defendant had been arrested and his request for an attorney denied. In this case, appellants were clearly suspected of criminal activity and were being investigated. To grant a right to counsel under such circumstances, including a right to advice of such

a right, would be to mutate a constitutional right into a denial of the right of the public to have criminal activity thwarted. There is no right to counsel while one is committing a crime. *Grier v. United States,* 345 F.2d 523, 524 (9th Cir. 1965).

The Butlers also assert that the trial court committed reversible error by allowing the jury to hear tapes of and simultaneously read transcripts of Durden's half of the recorded conversations, contending that "a great mass of prejudicial hearsay" was thereby allowed into evidence. No particulars of the "great mass" were pointed out by counsel. While it is true that a few of Durden's statements contained narrative statements of events not strictly in furtherance of the conspiracy, none of those statements could reasonably be said to be so prejudicial as to constitute reversible error. The Court made a very meticulous effort to excise all such narratives which, in its judgment, could be construed to be irrelevant, and refused to allow the transcripts into evidence, thereby avoiding any potential reinforcement of Durden's half of the conversations. For the Judge to have excised all of Durden's half of the discussions would have rendered the recorded conversations, which were legitimate evidence, unintelligible.

Except as indicated later, we find the remainder of the arguments raised by the Butlers regarding the trial on the heroin count to be devoid of merit.

THE DANGEROUS DRUG TRIAL

I

All of the appellants claim that they were prejudiced by misconduct of the prosecutor. The principal witness for the government was John Durden who had been caught by federal narcotics agents and apparently decided to cooperate by assisting the agents in their efforts to secure evidence against his fellow conspirators in hopes of receiving lenient treatment for himself.[2] During the course of the trial, Durden's credibility was frequently and vigorously attacked. One of the principal lines of assault comprised asking Durden whether in fact the pending indictment against him was going to be dismissed in consideration of his testimony against the defendants. To this question, he answered **"no."**

Appellants argue that, by allowing such testimony to go uncorrected, the prosecutor was acquiescing in the knowing use of false evidence in the manner forbidden by *Napue v. Illinois,* 360 U.S. 264 (1959), and more recently condemned in *Giglio v. United States,* 31 L. Ed. (2) 104 (decided February 24, 1972). However, such an argument is based upon the premise that a promise of dismissal had definitely been made to Durden and that this alleged promise was known to the prosecution. The government has at all times denied such a promise, and there is no evidence in the record to the contrary.

As a corollary to their "false evidence" argument, appellants contend that the trial court committed reversible error by not allowing them to argue to the jury that Durden's testimony was not worthy of belief since he had been promised a dismissal if he testified against the defendants. The trial judge stated he would allow counsel to argue that Durden had great *expectations* of a dismissal as anyone in a similar position would have. Under the circumstances, it was not unduly restrictive to prevent counsel from arguing that a dismissal was *in fact* forthcoming. Moreover, because the closing arguments are not before us, a proper evaluation of the issue is foreclosed.

II

All of the appellants challenge the admission into evidence against them of certain items seized by the police: a ledger taken from the purse of Mrs. Rodriguez, the wife of co-defendant Manuel Rodriguez, various scraps of paper with writing thereon taken from a trash container in front of the home of Leo Lovato, an indicted co-conspirator who fled before the trial, and two ledgers and some papers seized from a footlocker found in the garage of Leo Lovato. The bases of attack are that the items were secured by illegal searches and seizures and should have been suppressed and that the items lacked any foundation or authentication and were inadmissible.

As to the search of Lovato's trash container and locker, the trial court correctly ruled that the Butlers and Arias lacked standing to move for suppression.[3] Neither the Butlers nor Arias had any proprietary interest in the items in question, nor were they persons against whom the searches in question were directed. *Alderman v. United States,* 394 U.S. 165, 173-75 (1969); *United States v. Shea,* 436 F.2d 740 (9th Cir. 1970); *United States v. Toliver,* 433 F.2d 867 (9th Cir. 1970), *cert. denied,* 401 U.S. 913 (1971).

Regarding the ledger book seized from Mrs. Rodriguez, both appellant Rodriguez and his wife submitted affidavits in connection with the pre-trial motion to suppress, swearing that the ledger book belonged to Manual Rodriguez. Assuming, without deciding, that Rodriguez did have standing to move to suppress, examination of the circumstances surrounding the seizure reveals that the police did not overstep the bounds set by the Fourth Amendment. Rodriguez was arrested pursuant to information that there was a warrant for his arrest for federal narcotics laws violation. At that time, Rodriguez was sitting in a car in a parking lot along with his wife and son; the latter was in the driver's seat. After the arrest of Rodriguez, he and his son were questioned regarding the registration of the vehicle. The son said the car belonged to his father, whereas Rodriguez stated that he had borrowed the vehicle from a friend. A radio check revealed that the license plates on the

vehicle were registered to another vehicle. Mrs. Rodriguez and the son were questioned further regarding the vehicle's registration and, upon their failure to give satisfactory explanation, were placed under arrest for suspicion for grand theft auto. Pursuant to that arrest, Mrs. Rodriguez was subsequently "booked," at which time the contents of her purse were inventoried and the ledger in question was recovered. Even though subsequent investigation revealed that the car was not in fact stolen, it is clear that the officers had probable cause to believe that a crime had been committed by all three of the Rodriguezes, which, of course, provided legal justification for their arrest. *Beck v. Ohio*, 379 U.S. 89, 91 (1964). A warrantless search of personal possessions at the station house pursuant to a valid arrest does not violate one's Fourth Amendment rights. See, for example, *Charles v. United States*, 278 F.2d 386, 388 (9th Cir. 1960).

Counsel for Rodriguez cites *Whiteley v. Warden*, 401 U.S. 560 (1971), arguing that the arresting officers could not base their arrest of Rodriguez upon the mere report received via radio that there was an outstanding warrant for Rodriguez's arrest. In *Whiteley*, a sheriff had secured an arrest warrant based on his own conclusory statement that Whiteley had broken and entered a building, and then radioed a bulletin containing a description of the suspect, of the car he was driving, and of the amount and type of money

he was suspected of taking. Acting on the bulletin, an officer arrested Whiteley, searched his car and recovered damaging evidence against him. The Supreme Court held that the warrantless arrest based upon the radio bulletin could not supply the element of probable cause that the sheriff issuing the bulletin lacked, and so ruled that the seized evidence should have been suppressed.

Here, at the time of Rodriguez's arrest, there were two valid arrest warrants outstanding. One was issued by the district court pursuant to the return of an indictment charging Rodriguez with the crime of which he was ultimately convicted, and the other issued by a Magistrate upon an affidavit which adequately set forth the facts underlying the charging officer's conclusions, and so was sufficient to support an independent judgment that probable cause existed for Rodriguez's arrest. See *Spinelli v. United States,* 393 U.S. 410 (1969) and *Aguilar v. Texas,* 378 U.S. 108 (1964).

III

Aside from the question of the search, it is argued that all of the items seized lacked any foundation or authentication and so were inadmissible against the appellants. The government failed to present any proof that the writings were in the handwriting of any of the appellants, or of when the writings were made.

It is the function of the trial court to determine whether proffered evidence has enough prima facie trustworthiness to warrant its consideration by the jury, and generally the sufficiency of a showing of authenticity of a writing sought to be introduced into evidence is a matter within the discretion of the trial judge. *Arena v. United States*, 226 F.2d 227, 235 (9th Cir. 1955). Appellants insist that the mere contents of a writing which is purported to be authored by a particular person are insufficient evidence of genuineness. See 7 J. Wigmore, Evidence § 2148 (3rd Ed. 1940). However, circumstances extrinsic to the document may point with sufficient certainty to the person or persons who created it to allow the jury to consider the document. See, for example, *United States v. Sutton*, 426 F. 2d 1202, 1207 nn. 34-36 (D.C. Cir. 1969) and cases cited therein.

When Leo Lovato was placed under arrest at his residence, and in response to inquiry about dangerous drugs, he pointed out to the officers the location in his attached garage where the drugs could be found. The drugs were in boxes and a footlocker, the latter also containing two ledgers and various papers. The contents of the ledgers lead one to the obvious conclusion that they were records of a drug business. One of the ledgers seized from Lovato's Locker appears to contain a running account of distribution to the co-conspirators; under each of their names, each entry is dated, units of "R" and "W" or in some cases "Reds"

and "Whites" are recorded, and dollar amounts are noted next to the entries. The other ledger contains similar notations, but with the additional entries of, e.g., "C#1," "C#2," etc., "Pd $20 tip C#8," "Pd $250 to driver" and "Pd in full." Similar notations were contained on the slips of paper found in Lovato's footlocker. Also, some of the entries corresponded exactly with transactions about which there was independent evidence in the form of tape-recorded conversations and testimony of John Durden. Considering the reality that proof of conspiracies must often rely heavily upon circumstantial evidence [See *Diaz-Rosendo v. United States,* 357 F.2d 124, (9th Cir. 1966), *cert. denied,* 385 U.S. 856 (1966), and *Davenport v. United States,* 260 F.2d 591, 598 (9th Cir. 1958)], and given the circumstances of this case, we find ourselves in agreement with Professor McCormick:

> Should not the practice of accepting as prima facie genuine a document which comes from a natural custody be extended beyond the field of public duty, and be recognized for writings found in private custody? It seems that it should, but that here the practice should be discretionary and that if the judge finds that the purport of the writing and the fact that it was found in a place and custody natural for such a paper, and the other attending circumstances, make its genuineness substantially probable, it should come in.[4]

The same conclusion was reached in *People v. Ramsey,* 83 Cal.App.2d 707, 189, P.2d 802 (1948) in dealing

with a similar situation. At defendant's home, where an alleged abortion occurred, a looseleaf notebook was found in a cupboard beside a telephone where an appointment book would usually be kept. The notebook contained entries showing a date, time, name, address and telephone number which were consistent with the alleged abortion. The Court ruled that the notebook was admissible, despite the fact that neither authorship nor when the entry was made was shown.

Since the ledgers and other papers taken from Lovato's footlocker are technically hearsay, an alternate theory of admissibility is that they constituted an admission by Lovato. Here, Lovato in effect identified the documents as his own by directing the agents to his "business store-room" where they were found with his contraband merchandise. The circumstances here provide a much more reliable index of genuineness than, for example, an unsigned letter found on a defendant's premises with no independent evidence to demonstrate a meaningful connection. See *Poy Coon Tom v. United States,* 7 F.2d 109 (9th Cir. 1925).

Admissibility as to Lovato does not end the inquiry—the question of admissibility as to appellants remains. However, the trial judge properly instructed the jury that, if they found a conspiracy did exist and that a defendant was a member of the conspiracy, then the statements and acts of those found to be members of the conspiracy (as Lovato) may be considered by the jury as evidence in the case as to any defendant

found to have been a member, provided such statements or acts were knowingly made or done during the continuance of the conspiracy, and in furtherance of some object or purpose of the conspiracy. In this case, the evidence was overwhelming that a dangerous drug conspiracy and a heroin conspiracy did exist, and the majority of the testimony, including the tape-recorded evidence in both the dangerous drug case and the heroin case could easily have supported a finding by the jury that Leo Lovato was a member of each of the conspiracies. The contents of the ledgers and other papers appear on their face to have been written during the course of the conspiracy and in furtherance of the objects of the conspiracy. Such evidence, coupled with the independent evidence of each of the defendant's participation in the conspiracy[5] was sufficient to allow the jury to consider the ledgers and other papers taken from Lovato's footlocker as to each defendant.

The scraps of paper taken from the trash of Lovato do not qualify under either of the rationales used to admit the ledgers and other papers taken from the footlockers. There is a great difference between a defendant identifying to arresting officers the whereabouts of contraband and records of contraband transactions and merely finding discarded memoranda in a person's trash. The nature of the contents of the scraps recovered from the trash also leaves much to be desired as far as providing circumstantial evidence

of their genuineness. Most of them apparently contain no more than doodles, unrelated telephone call messages (e.g., "Johny will call back") and lists of numbers with letters beside them which could easily be taken as reflections of transactions merely contemplated rather than records of transactions actually planned or completed. We, therefore, hold that the admission of the scraps of paper recovered from Lovato's trash was error. However, in view of the other evidence in the case, the error was harmless.[6]

We take a similar view of the introduction in the dangerous drug trial of the ledger book seized from the wife of Rodriguez. Only twelve of the seventy-five pages of the book contained writings which the trial judge deemed sufficiently relevant to admit into evidence, and even those pages present a rather sketchy and confusing picture. It is unnecessary to reach the question of the admissibility of the ledger because, as stated above, any error could only be harmless.

IV

Rodriguez complains that some of the tapes that were heard by the jury contained prejudicial statements; the primary complaint is with respect to a statement by Joe Lovato that "He'll [referring to Rodriguez] go tonight and kill somebody, or something." We hold that the admission of such a statement was not reversible error for two reasons. First, taken in context, it is highly unlikely that the jury could have

understood the statement to mean that Rodriguez was actually going to commit murder. The full statement was, "The other thing is that Manuel, they don't play with Manuel and Manuel might get in some trouble you know, that way. He'll go tonight and kill somebody, or something." It seems apparent that Joe Lovato was merely trying to communicate that Manuel (Rodriguez) was a bit too impulsive to stay out of trouble as far as some were concerned, so that he was not to be trusted fully. The second reason is that the trial judge immediately instructed the jury to disregard the statement about killing. In our view, the combination of these two factors made the error, if there was any, harmless.

V

All of the appellants argue that the evidence taken in the light most favorable to the government showed the existence of multiple conspiracies rather than a single conspiracy and that, therefore, the judge committed reversible error by refusing to instruct the jury on the possibility of finding multiple conspiracies. Principal reliance is placed upon *Kotteakos v. United States*, 328 U.S. 750 (1946), where the Supreme Court found that only one of the defendants had participated in a number of separate and distinct conspiracies with a number of different individuals, and so there was no conspiratorial nexus tying all of the defendants together in a conspiracy common to all. The rationale

of the decision was that it was highly prejudicial to the defendants to allow all the evidence of the separate crimes to be introduced against all of the defendants to prove a single crime.

We think that this case is controlled by the law set forth in *Blumenthal v. United States,* 332 U.S. 539 (1947). In that case, three salesmen separately agreed to distribute illegal whiskey for two other defendants, who had an agreement between themselves; no salesman knew or had any dealings with any other salesman and each was geographically far from the others. The Court distinguished the *Kotteakos* case and found that only one conspiracy existed:

> By their separate agreements, if such they were, they became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal. 332 U.S. at 558.

Here, the evidence was very persuasive that most of the co-conspirators not only knew of the others, but that all knew of and participated in the illegal plan of distribution of the amphetamines and barbituates. Under such circumstances, we hold that it was not error for the trial court to refuse to give an instruction on the possibility of finding multiple conspiracies.

VI

During the course of the trial, some of the attorneys for the defense were occasionally excused for short times to attend to other matters. Each time, other counsel agreed to represent the interests of the absent attorney's client. Appellant King contends that such occasional "pinch hitting" deprived him of his right to counsel, or at least his right to effective assistance of counsel. However, no objections were made by King during the course of the trial to this procedure; on the contrary, he specifically consented to it the two times that his counsel was absent. Although such a practice may be questioned, it is well settled that where, as here, there was no plain error, one may not raise on appeal that to which he did not object at trial. *United States v. Markham,* 440 F.2d 1119 (9th Cir. 1971); *White v. United States,* 315 F.2d 113 (9th Cir. 1963), *cert. denied,* 375 U.S. (1963); *Grant v. United States,* 291 F.2d 746 (9th Cir. 1961).

We find the remainder of appellants' argument to be without merit.

Affirmed.

FOOTNOTES

1. Appellant King asserts the same error was committed in his trial involving dangerous drugs.

2. The Butlers and Rodriguez assert in their briefs, and the government has not denied, that about two months after the convictions challenged here, the indictment against Durden was dismissed by the government.

3. Rodriguez also moved to suppress the material taken from Lovato's footlocker. Apparently the trial judge never ruled on Rodriguez's motion [Clerk's Record, p. 306].

4. C. McCormick, Evidence § 191, p. 403 (1954). *See also* 7 J. Wigmore, Evidence § 2160 n. 4 (3d Ed. 1940), and cases cited. Wigmore is cited as sole authority in *United States v. Imperial Chemical Industries, Ltd.*, 100 F. Supp. 504, 513 (S.D. N.Y. 1951).

5. Taken in the light most favorable to the government (*Glasser v. United States*, 315 U.S. 60, 80 (1942)) the other evidence with respect to the dangerous drug conspiracy was as follows:

Amphetamines and barbiturates in the form of pills were packaged in plastic bags, which were concealed in the paneling of cars, and the "load" cars were driven across the border to various places, apparently at the direction of Joseph Damian Lovato (hereinafter "Joe Lovato"). Also at the direction of Joe Lovato, generally defendant Hilaria Aguilar, known as "Rosa," would call Durden and tell him where to pick up an incoming load car.

Durden would then pick up the load car, dismantle it to retrieve the contraband, hide the contraband, and return the load car to the same place it was picked up. Then Durden would generally check back with Rosa, who informed him to whom he was to distribute the drugs, apparently on a consignment basis.

According to Durden's testimony, he first met Manuel Rodriguez in the company of Joe Lovato [R.T. 605]. Joe Lovato asked Durden to hold some drugs for him while he (Joe) made a trip into Mexico [R.T. 607], to which Durden agreed. Manuel Rodriguez then took thirty bags of "reds," each containing five thousand pills, from his own car and placed them in the trunk of Durden's car [R.T. 607-608].

Durden also testified that he distributed loads of pills to Manuel Rodriguez on a number of occasions [R.T. 628-629, 654-655 and 940-941]. Durden also testified that Rodriguez had supplied Durden with pills [R.T. 610-615].

According to the testimony of narcotics Agents Sternaman and Tarallo, while surveiling the residence of Joe Lovato, Rodriguez was seen in the company of Vincent Arias, exiting Lovato's residence. Rodriguez and Arias drove away together, went into a restaurant and returned in a while to Lovato's residence. While the two were at the restaurant, a dark brown ledger was observed by Agent Tarallo on the seat of the vehicle the two were in [R.T. 1212-1213 and 1316-1318].

A fellow employee of Rodriguez testified that Rodriguez got up abruptly from an interview at his company's personnel office upon sighting a police car through the window and trotted away [R.T. 1387-1389]. The officer who arrested Rodriguez confirmed the testimony regarding his attempted flight [R.T. 1570-1572].

A fingerprint expert testified that Rodriguez's fingerprints appeared on four separate pages of a ledger book recovered from the purse of his wife, who was also arrested with Rodriguez [R.T. 1592-1593]. Agent Tarallo testified that the same ledger book was the one he had earlier seen on the seat of the vehicle which Arias and Rodriguez had taken to the restaurant from Joe Lovato's residence [R.T. 1610].

The ledger book taken at Rodriguez's arrest contained lists of "R" and "W" ("Whites" is a term which also is used in that exhibit) under peoples' names, dated within the period of the conspiracy. These dates substantially coincided with the dates of deliveries to Leo Lovato as evidenced by the latter's ledgers.

Agent Sternaman testified that on April 1, 1970, he and Agent Clemente arrived as Manuel Rodriguez was being booked into jail [R.T. 1623]. He examined the ledger book which had been taken from Mrs. Rodriguez, told the jailers of his interest in it as evidence and of his intention to take it later [R.T. 1649]. Sternaman thereupon advised Rodriguez of his rights and ascertained that Rodriguez understood these rights [R.T. 1624]. Sternaman, while leafing through the book, asked Rodriguez what the "W" and "R" stood for. Rodriguez responded by smiling and shrugging [R.T. 1628-1629, 1655]. When asked if the letters stood for drugs, Rodriguez shrugged and smiled faintly again [R.T. 1655]. (The Court instructed that the jailhouse interview testimony was to be taken only as to Rodriguez [R.T. 1654].)

Durden testified that Arias received five separate loads of amphetamines and barbiturates, totalling nearly a million pills from Durden from the middle of August through the first week of September, 1969 [R.T. 620-630 and 647]. Durden also testified that Arias called him several times during the period of the conspiracy and inquired as to whether Durden had anything on hand [R.T. 768].

Durden testified that Charles King came to Durden in June, 1969, and received twenty thousand or twenty-five thousand reds [R.T. 612-614]. Two more loads of five thousand or ten thousand pills were distributed by Durden to King in August, 1969 [R.T. 628-629 and 654-655].

In a taped telephone conversation between Durden and Robert Butler, in response to inquiry by Durden as to whether Lovato would have "something" for Durden, Butler replied, "He's all empty . . . he only got those 30, 30, 35 I think. The ones he got from those other people. And he hasn't got anything in since then. He bought these from another source and these people charged him 5 over what he normally was going." Robert Butler also stated to Durden, "I told him I'm going over there with him next time . . . trip coming up here you know." [Transcript of Recording, pp. 227-229].

In another conversation with Durden, Robert Butler asked Durden whether he could get some older model cars for Joe Lovato and Robert Butler [R.T. 697 and 702-704].

Durden testified that he had seen Robert Butler at one time accompanying Joe Lovato, and that there was conversation between Butler and Lovato about load cars. In response to a statement by Lovato that another load car would be in that night, Butler replied that he wanted either one hundred thousand or two hundred thousand "reds" and thereafter engaged in a conversation with Lovato about such a drug transaction [R.T. 745-749]. Lovato then made a telephone call, asking the other party whether there were "20 big ones or 20 pillows" available. Shortly thereafter, Leo Lovato arrived and immediately left with Robert Butler. Soon thereafter, Leo and Robert Butler returned, whereupon Butler made a telephone call and asked for money and said, "I have got the stuff." [R.T. 768-772].

Ted Butler was accompanying Durden when he was arrested by undercover Agent Sternaman for attempting to sell Sternaman fifty thousand reds and fifty thousand whites [R.T. 661-663].

In their jail cell, Durden explained Lovato's dangerous drug operation to Ted Butler. Butler expressed to Durden that he had not previously been aware of what had actually occurred but that as long as he was involved now, he would like to get fully involved in the operation. Durden had not proposed that Ted Butler get involved; Butler volunteered [R.T. 668-673].

The day after Durden and Ted Butler were released from jail, they went to a telephone booth and, with Ted Butler waiting in the car, Durden called Joe Lovato [R.T. 674-675]. When Lovato told him there was another car in, Durden told him he would call back. Durden then told Ted Butler about the car and suggested that they find some place new to store the load; Butler agreed [R.T. 675]. The two men drove to another person's house to find if they could keep the drugs there, but the individual was not there. Since they were leery that agents might be following them, Durden decided that it would be best not to store this load [R.T. 675-676].

The weekend after Durden was released from jail, he met with Joe Lovato and Vincent Arias and told them that Ted Butler had been arrested with Durden [R.T. 679-680]. Ted Butler soon became involved with Lovato in acquiring dangerous drugs. Ted Butler once presented Durden with $580 to pay to Joe Lovato as one payment for Butler's prior acquisition of twenty thousand barbiturates [R.T. 980, 984]. The total payment was $1,100; Butler had previously paid Lovato $520 [R.T. 984-985].

On November 19, 1969, Durden called Joe Lovato. Lovato told Durden that there were three barrels of reds and one of whites across the border which he wanted somebody to go down and pick up [Transcript of Recording, pp. 287-288]. Lovato wanted Durden to get a car in which to "hide them" [Transcript of Recording, p. 288]. Durden called Ted Butler, who stated that he would pick up the load with Durden [R.T. 735-736].

The independent evidence of participation in a conspiracy to conceal, transport and sell heroin by the Butlers is similarly persuasive. Durden testified that when he first met Robert Butler through Joe Lovato (who was indicted but failed to appear for trial) on October 30, 1969, heroin trade was discussed. The same subject was discussed by Robert Butler and Durden alone again the next day, and Robert Butler said that he would have to "go back to Ohio" to get a sample due to the poor quality supplied by Joe Lovato.

Durden was present on November 3, 1969, when Robert Butler and Joe Lovato met to discuss the purchase of heroin. A small purchase was made by Robert Butler, and arrangements were made by Butler to buy more "if the stuff was good."

About December 8, 1969, Durden talked with Robert Butler about his recent trip east. Later on that day, Joe Lovato, Robert Butler and Durden had a conversation at the Torch Club about "eastern business." Durden and Robert discussed the heroin Butler was to get to take east in monitored telephone calls, which were played at the trial.

Durden testified to several conversations between Joe Lovato and Robert Butler wherein Robert and Durden agreed to help Joe find "load cars"—old automobiles that could be used to transport heroin from Mexico into the United States without losing too large a sum if the smuggling was caught and the cars confiscated. Robert Butler delivered keys for such a car to Lovato.

Another meeting between Joe Lovato and Butler, with Durden present, produced further details of Robert Butler's distribution of Lovato's heroin in several eastern cities [R.T. 90-92]. It was one of Robert Butler's functions,

along with Durden, to acquire the load cars to enable Lovato secretly to smuggle heroin from Mexico [R.T. 171-172].

Ted Butler, in December, 1969, called Durden relaying Lovato's desire to get back some heroin mistakenly given to Durden [R.T. 79]. Leo Lovato once gave Ted Butler two ounces of heroin for Durden. Butler held this heroin for a period of time and finally sold it [R.T. 95]. This transaction was supported by Ted Butler's recorded telephone conversation in December which showed that he had received some heroin from Leo Lovato [R.T. 535; Transcript of Recording, pp. 363-364]. Later, in a recorded conversation, he said he had sold two ounces of heroin to a person named Thomas King [R.T. 538; Transcript of Recording, p. 399].

6. See text at note 5, *supra*. Furthermore, the ledgers from Lovato's footlocker provided additional strong circumstantial evidence.

APPENDIX "B"

No. 71-1029
71-1030

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
vs.)
ROBERT BUTLER and)
TED DEAN BUTLER,)
Defendants-Appellants.)

PETITION FOR REHEARING

To the Honorable Judges Barnes, Ely and Wallace, Circuit Judges:

Robert Butler and Ted Dean Butler respectfully petition for rehearing of the decision of this Honorable Court convicting them, and each of them, for conspiracy to possess for sale and to sell dangerous drugs, amphetamine tablets and barbituate capsules in violation of Title 21 USC Sec 331(q) and 18 USC Sec. 371, and with conspiracy to conceal, transport and sell heroin in violation of 21 USC Sec. 174 and 18 USC Sec. 371, on the following grounds, to-wit:

1. The Court erred in matters of law in its opinion.

2. The Court erred in matters of fact in its opinion.

3. The Court failed to rule on important questions of law raised by appellants and failed to assert that the errors committed did not fatally infect the verdicts, and each of them, beyond a reasonable doubt. (*Chapman v. California* 386 US 18, 17 L.ed.2d 705)

4. The Court also failed to rule on whether the defendants were once in jeojardy at the end of the first trial and whether a second trial could be had on the same indictment after a verdict of guilty as to the first trial, thus barring the second trial on the same indictment because the defendants Butler had been once in jeopardy.

The Court states that the appellants together charge 62 errors in this appeal. The Court has not ruled on several of them and has not declared that any one of the 62 errors did not fatally infect the verdicts against the appellants.

The Court treats the electronic surveillance as the law existed in 1969 and 1970 under the decision of *U.S. v. James A. White,* 401 US 475, 28 L.ed.2d 453, who was indicted in 1966 and whose case was passed upon as to the alleged activities existing at that time. Since then, the Congress has passed Chapter 119 of Title 18, Sec. 2510-2520, expressing the limitations of wire interception and interception of oral communications. (Title 18, Secs. 2510-2520) It has only per-

mitted interception in certain types of cases (Sec. 2515 of Title 18) and only upon an application to a Judge of a Court of competent jurisdiction. Title 18, Sec. 2518 provides for the procedure and provided for the procedure necessary to intercept oral communications and required a full statement of probable cause on which the Magistrate or Judge could rule and the period of time during which such interception is authorized and when that interception may terminate.

The conversations between Durden, who was actually acting as a government agent, and the defendants was in no way authorized by any Magistrate or in conformity with the provisions of Title 18, Sec. 2518, and we believe that sound law as set forth by Congress in this Chapter rebuts and refutes the authority to proceed as Durden did, the voice being the voice of Durden but the words being those of the federal agent sitting alongside of him. Durden was playing Charlie McCarthy to the government's Edgar Bergen. We think this was trickery and fraud forbidden by the Fifth and Fourteenth Amendments to the Constitution of the United States.

In *Lisenba v. California,* 314 US 219, 237, 86 L.ed. 166, 180, the Court said: "If, by fraud, collusion, trickery and subordination of perjury on the part of those representing the state, the trial of an accused person results in his conviction he has been denied due process of law. The case can stand no better if, by the same devices, a confession is procured and used in the trial."

There was a showing that there was a corrupt bargain with Durden by which it was agreed that Durden's case would be dismissed if he testified against the defendants. Durden denied this during the trial but subsequent to the trial his case was dismissed, thus corroborating in fact what he had denied in the trial itself. The Fifth and Fourteenth Amendments forbid this. (*Lisenba v. California,* 314 US 219, 86 L.ed. 166, supra)

The electronic conversation which was introduced before the Court and jury was an alleged recitation of past events. It was not "criminal activity which was being thwarted." Neither defendant was shown to be committing a crime in any of the conversations. There was conversation in which Durden sought to affirm his own criminal activities but none that involved the Butlers. At no time was Robert Butler ever shown to have been in possession of any narcotic nor was there any testimony that he was intending to be. Only one transaction involved Ted Butler and that was as an employee of the arch criminal Durden, whose case the government saw fit to dismiss and at the same time the indictment against Durden joined Ted Butler and it too was dismissed, leaving Ted Butler convicted herein.

The Court misconceives our position in regard to the recordings. If the officer or agent sitting next to Durden was himself to call up the defendants and to seek a confession or admission, it would be neces-

sary under the law to lay a foundation as to its free and voluntary character and as to the necessity of giving the defendant a *Miranda* warning. We do not believe that he could do indirectly what he could not do directly and under the authority of *Lisenba v. California,* 314 US 219, 86 L.ed. 166, *supra,* and other cases, and the Wire Interception and Interception of Oral Communications Act, Chapter 119. Such evidence was inadmissible and improperly received.

Furthermore, the tapes were improperly read to the jury and included the other half of the conversations which were hearsay and without which the other parts of the conversation were unintelligible and should therefore have been inadmissible.

The Court says in reference to the statement that a promise of dismissal had definitely been made to Durden and that this alleged promise was known to the prosecution: "The government has at all times denied such a promise, and there is no evidence in the record to the contrary." Surely actions speak louder than words. The dismissal of all charges against this arch smuggler shortly after the case terminated can leave this Court with no other inference than such a promise was made to Durden and his attorney.

The record does not show that in the oral argument government counsel admitted in response to a question by Judge Ely that he had contemplated reducing the charge to a misdemeanor without advising

defense counsel of the situation. We now have in practice, especially in the State courts, what is known as plea bargaining, in which the prosecutor must disclose fully any and all promises made. We think that due process requires such exposure under *Napue v. Illinois*, 360 US 264, *Brady v. Maryland*, 373 US 83, 10 L.ed.2d 215, and *Giglio v. U.S.*, 31 L.ed.2d 104.

In connection with the pleas of once in jeopardy, the Court has not seen fit to pass on them. They were entered after the first trial.

With respect to the lack of proof that the articles referred to were in fact amphetamines or dangerous drugs, the government chemist failed to be able to give even the chemical formulas and only examined a few of the items which Durden produced. None were produced as to anything in the possession of or known to have been in the possession of either of the defendants Butler.

The Court had before it in reference to other parts of the case the discovery of articles taken from trash bag of Lovato and the issue of whether trash bags may be the subject of illegal searches and seizures now is before the United States Supreme Court in the case of *People v. Krivda* from the Supreme Court of California, in which a decision by the majority of the Supreme Court of California held that the trash bags were protected by the Fourth Amendment and not subject to searches and seizures and the matter will be

argued in the Supreme Court of the United States this fall session and would affect that part of the case before this Court.

Also, we think that the Butlers had a right under the Sixth Amendment to cross-examine the witnesses in the case on all matters relating to the conspiracy charges and that *Alderman v. U.S.*, 394 US 165, 173, 175, should be re-examined. The State law of California permits such cross-examination. We respectfully submit that any person affected by the conspiracy charge ought to have the right under the Sixth Amendment to cross-examine any witness who appears for the prosecution on any phase of the case. The Butlers were barred from this right and their rights under the Sixth Amendment were therefore violated.

We also call attention of the Court to *Gelbard v. U.S.*, 33 L.ed.2d 179, in respect to the views of the Supreme Court on the right of individual privacy which was invaded in this case by Durden and the narcotic officers and that Durden's consent was not sufficient to overcome the protection of the privacy.

Also, the use of the telephone in California requires the consent of the telephone company and this Court did not pass upon that requirement either, as no consent was received from the telephone company. The case of *People v. Treiber*, 28 Cal.2d 657 holds "A connection through an individual subscriber telephone service was an unauthorized connection under

California Penal Code Sec. 640 unless it was made with the authorization of the subscriber as well as the telephone company . . . The subscriber cannot, without the approval of the telephone company, authorize a connection to a telephone wire. This section protects telegraph and telephone facilities from physical injury and safeguards communication of electronic communications."

Therefore, in California Durden had no authority, nor did the officers have any authority without the consent of the telephone company.

We pray for rehearing and reversal of the judgments below.

Respectfully submitted,

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APPENDIX "C"

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September 5, 1972

Hon. Stanley Barnes and

Hon. Judges Ely and Wallace

U.S. Court of Appeals
P.O. Box 547
San Francisco, California 94101

Re: USA v. Robert Butler and Ted Dean Butler,
Nos. 71-1029 and 71-1030

Your Honors:

In petitioning for rehearing, because of the holiday we were unable to present and point out certain errors of fact and law in the opinion of the Court of Appeals and therefore supplement it with this letter.

The opinion says on page 1 of the typewritten opinion, lines 25 and 26: "With Durden's consent, the recordings were made by connecting *his* telephone with a tape recorder." This is an erroneous statement of fact. Durden was in the narcotics squad of the police

department, using the police telephone and phoning directly into the home or business of the Butlers and the recordings were made of words and statements requested by the narcotics officers sitting alongside of Durden. This was without the consent either of the telephone company or of the Butlers and was not on Durden's telephone but on a police telephone. This is not the *White* case nor the *Hoffa* case nor the *Lewis* case nor the *Lopez* case cited in the opinion.

The *White* case, 401 US 745, is a case in which the informant was wired by a concealed radio transmitter and the conversation took place in Jackson's home and not over the telephone.

This is not the *Katz* case, 389 US 347, nor *Silverman v. U.S.*, 365 US 505, nor any of the other cases dealing with electronic surveillance, nor *U.S. v. U.S. District Court*, 32 L.ed.2d 752, nor *Berger v. N.Y.*, 388 US 41.

In the case at Bench, the recordings were of a telephone connected from the police department to the home of the appellant. *Hoffa v. U.S.*, 385 US 291, cited by the Court, is a case where another Labor Union executive discussed the facts o fthe alleged attempted bribery with the paid informer in a hotel suite. No telephone connection between the police department of the defendant was involved.

In the case of *Lewis v. U.S.*, 385 US 206, a narcotics agent misrepresented his identity and was in-

vited into the home of defendant. The agent had on him a recording device to record the transaction. This was not the use of a telephone from the police station to the defendant, unconsented to by the telephone company and not approved in any way by any Judge or authority, and is not the case of appellant herein.

The other case cited by the Court, *Lopez v. U.S.*, 373 US 427, is also clearly distinguishable. In the *Lopez* case, the evidence showed that the defendant first made an unsolicited offer of money to an internal revenue agent for the purpose of obtaining his asistance in concealing any cabaret tax liability and that at a later meeting in the defendant's office the latter's improper overtures began almost at the outset of the discussion, which was wire recorded by a device carried by the agent. Again, the case is not a case where the agent or someone else acting for the agent and speaking the agent's words used the telephone to phone the defendant in that case, as done in the case at Bench.

The misuse of the telephone and the misuse of Durden to speak the words of the agent into the telephone for the purposes of recording the conversation, half of which only was submitted to the jury, is clearly in violation of *Katz v. U.S.*, Title 47, Sec. 605, U.S.C., the laws of the State of California prohibiting the use of the telephone except by subscribers thereto, the fact that this was a telephone belonging to the police department and not Durden, and in violation clearly of

the Fourth Amendment to the Constitution of the United States where the words and thoughts of the speaker were unlawfully seized.

In *Alderman v. U.S.*, 394 US 165, 171, the Court said: "The exclusionary rule fashioned in *Weeks v. U.S.*, 232 U.S. 383, 58 L.ed. 652, 34 S.Ct. 341 (1914), and *Happ v. Ohio,* 367 U.S. 643, 6 L.ed. 1081, 81 S.Ct. 1684, 84 ALR2d 933 (1961), excludes from a criminal trial any evidence seized from the defendant in violation of his Fourth Amendment rights. Fruits of such evidence are excluded as well. *Silverthorne Lumber Co. v. U.S.,* 251 U.S. 385, 391-392, 64 L.ed. 319, 321, 322, 40 S.Ct. 182, 24 ALR 1426 (1920). Because the Amendment now affords protection against the uninvited ear, oral statements, if illegally overheard, and their fruits are also subject to suppression. *Silverman v. U.S.,* 365 U.S. 505, 5 L.ed.2d 734, 81 S.Ct. 679, 97 ALRD2d 1277 (1961); *Katz v. U.S.,* 389 U.S. 347, 19 L.ed. 576, 88 S.Ct. 507 (1967). * * * We do not deprecate Fourth Amendment rights. The security of persons and property remains a fundamental value which law enforcement officers must respect. Nor should those who flout the rules escape unscathed. In this respect we are mindful that there is not a comprehensive statute making unauthorized electronic surveillance a serious crime. The general rule under the statute is that official eavesdropping and wiretapping are permitted only with probable cause and a warrant. Without experience showing the contrary, we should

not assume that this new statute will be cavalierly disregarded or will not be enforced aganst transgressors."

The defendants and appellants have standing to challenge the seizure of their conservations unlawfully.

So far as Ted Butler is concerned, he was arrested at the same time Durden was arrested, at the very inception of Durden's arrest and seizure. Robert Butler was being telephoned to as well as Ted Butler to attempt to gather evidence. They were certainly direct parties in interest in these conversations which were seized without the consent of any Magistrate or any statute authorizing it. See: Omnibus Crime Control and Safe Streets Act, Public Law 90-351, 82 Stats. 211, 225.

The statement in the opinion, page 3, "At the time of the recorded telephone calls, appellants had not been indicted and were not represented by counsel as in *Massiah,*" this is also incorrect. Durden and Ted Butler were indicted and accused at the same time, at the outset of the relations between Durden and the government. It appears that he was in fact represented by counsel at the arraignment on this separate charge.

So far as Robert Butler was concerned, the investigation had in fact, for all practical purposes, reached the accusatory phase and Durden was trying to establish a case for the government against Robert Butler. It is incorrect to state that appellants were clearly suspected of criminal activities and were being investi-

gated. Ted Butler had already been accused and arraigned and so far as the officers and the government were concerned, so was Robert Butler accused but not yet indicted. The statements solicited from the Butlers, although their truth has been denied, were purporting to be narratives of past events. There is nothing in the telephone conversations which constituted committing a crime.

The case of *Grier v. U.S.*, 345 F.2d 523, 524, is clearly distinguishable and different. In *Grier v. U.S.*, an informer was carrying a pocket broadcasting device and government agents were listening to statements made by defendant during commission of an alleged offense. This is not the case at Bench, where Durden used the narcotic agent's telephone to phone into the home of Defendant Butler to discuss narratives allegedly of some past event or events and was not any proof of criminal activity thrwarted.

The Court also says that the great mass of hearsay evidence permitted to go before the jury was not pointed out. The transcript of the record of the statements made to Durden and his response was and is all before the Court and it would have taken a brief almost double the size of the other one to have specifically pointed these statements out. Nevertheless, practically half of everything that Durden said was doubled by the half that was inadmissible in evidence as hearsay yet was permitted to go before the jury. The Court admits, as it must, that to have excised all of Durden's

half of the discussions would have rendered the recorded conversations unintelligible, so we have a conviction based on 50 per cent of inadmissible testimony. We submit that this is prejudicial error.

The Court fails to point out the lack of foundation or sufficiency of proof of the so-called dangerous drugs, only a few samples of which were examined by a federal chemist who could not give the formula of even the few samples which they asserted they examined.

The Court also seems to have slid by or justified the misstatements of the prosecutor as to his intentions regarding a dismisal of Durden's case. The Judge commented in the thial that he would be very much surprised if the government dismissed the case against Durden. That surprise was awaiting him two months after the trial and speaks louder than words of what the prosecutor intended.

During the oral argument admissions were made by the prosecutor of his intentions which were not disclosed to the defense as required by *Brady v. Maryland,* 373 U.S. 83, *Giglio v. U.S.,* 31 L.ed.2d 104, and *Napue v. Illinois,* 360 U.S. 264. We ask the Court to have the oral argument of our case written up so that the exact statements by the government counsel and his reply to Judge Ely may be made a part of this record.

In reference to the right to challenge the use of information secured from the trash containers in front of the home of Leo Lovato, we wish to call attention to the fact that the U.S. Supreme Court now has before it the case of *People v. Krivda* for hearing from a decision by the Supreme Court of California, holding that these trash bags are private and not subject to seizure by government officers.[1]

We repeat and reassert all of the other errors raised by all counsel and respectfully ask the Court to grant a rehearing and to reverse the cases of the two Butlers.

Respectfully,

MORRIS LAVINE,
Attorney for Robert Butler
and Ted Dean Butler

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[1]The Supreme Court of U.S. referred the trash bag case (*Krivda v. California,* 5 Cal. 3d 357) back to California's Supreme Court which held that information obtained from the bags violated both federal and state law and affirmed its previous reversal because of the illegal search and seizure 8 Cal. (3) 623.

ML:jyb
cc: U.S. Attorney
Norman Kaplan, Esq.
Barry Tarlow, Esq.

APPENDIX "D"

AMENDMENT OF OPINION AND DENIAL OF HEARING

Before: BARNES, ELY and WALLACE, Circuit Judges.

In connection with our discussion pertaining to the non-applicability of *Massiah* (slip opinion, page 3), we have reviewed the citations which we requested counsel to provide to us and find nothing *in the record* to substantiate the contention of counsel that Ted Butler was represented by an attorney when the telephone conversations with Durden occurred. But this is only a preliminary distinction. The conversations are clearly admissible under the reasoning of *Hoffa v. United States,* 385 U.S. 293, 304 (1966) and *United States v. White,* 401 U.S. 745, 752 (1971).

The opinion shall be modified as follows: at page 3 of the slip opinion, line 7, before the word "At" there shall be inserted "Aside from other reasons," and on page 3, line 8, between the word "calls" and line 9, the word "represented" there shall be inserted "the record does not demonstrate appellants had been indicted and were . ."

Also, the word "his" shall be deleted at page 2, paragraph 3, line 5, and the word "the" shall replace it. After the word "telephone" at page 2, paragraph 3, line 5, shall be inserted the words "he was using."

Under the facts of this case it makes no difference what telephone Durden was using.

The "double jeopardy" argument is summarily rejected. It was not mentioned in the opinion, along with over fifty other contentions which we deem to have no merit.

We have now reviewed the transcript of the closing arguments. The last sentence on page 4 of the slip opinion is deleted. Our decision on the issue remains the same.

The petition for rehearing is denied.

APPENDIX "E"

No. 71-1029
71-1030

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
vs.)
ROBERT BUTLER and)
TED DEAN BUTLER,)
Defendants-Appellants.)

PETITION TO RECONSIDER AND REHEAR MATTERS ON REHEARING AND OTHER MATTERS OVERLOOKED IN THE DECISION.

To the Honorable Judges Barnes, Eli and Wallace, Circuit Judges:

Come now Ted Dean Butler, No. 71-1030, and Robert Butler, No. 71-1029, and respectfully petition for rehearing of the amendment of opinion and denial of rehearing rendered by this Court February 7, 1973, and in respect thereto set forth as follows:

1. The Court erred in matters of fact and law in its amendment of opinion and denial of rehearing.

2. The Court omitted facts which should cause a rehearing and reversal.

3. The Court erred in procedural matters governing the plea of double jeopardy.

4. The Court erred in procedural matters concerning the law of conspiracy.

5. The Court failed to get a transcript of the proceedings on the oral argument which governs misconduct of the prosecutor in failing to reveal that he intended to grant Durden leniency or a dismissal, thus preventing the defendants from attacking and arguing the lack of credibility of Durden. (*Napue v. Illinois,* 360 US 264; *Giglio v. U.S.*, 31 L.ed.2d 104).

In its amendment of opinion the Court said: "In connection with our discussion pertaining to the non-applicability of Massiah (slip opinion, page 3), we have reviewed the citations which we requested counsel to provide to us and finding nothing *in the record* to substantiate the contention of counsel that Ted Butler was represented by an attorney when the telephone conversations with Durden occurred." Emphasis by the Court).

Surely, this Court must and does take judicial notice of the Court records which reveal that Ted Butler and Durden were arrested at the same time and jointly indicted in U.S. District Court in indictment No. 4847 AAH (Hauk) for violation of Section 331(q)(2),

(3) of Title 21, U.S. Codes, and that at all times Ted Butler was represented by counsel, including the times that Durden, sitting alongside of a narcotic officer and at the Bureau of Narcotics, telephoned Butler. Although the transcript of the record of this trial does not bring up the record of the proceedings before Judge Hauk, they were pending and Butler was represented at all times from his arrest to the time of his dismissal. Attorney Saul J. Bernard represented both Durden and Ted Butler until their cases were severed, at which time the Court ordered attorney Richard Kolostian to represent Ted Butler until the case was dismissed September 29, 1970.

Ted Butler was reindicted along with all of the other defendants in case No. 71-1030 on the same evidence presented to the grand jury that resulted in his indictment in the case 4847 right after his arrest. The fact that the record in 4847 AAH was not a part of the record of this trial did not alter the facts which this Court must consider and should correct its error. The records of the two Courts will demonstrate that Ted Butler was at all times, from the time of his arrest and first indictment, represented by counsel and was so represented when Durden was telephoning him.

Although the Court says further: "The conversations are clearly admissible under the reasoning of *Hoffa v. United States,* 385 US 293, 304 (1966) and *United States v. White,* 401 US 745, 752 (1971)," it has failed to distinguish this case from *Hoffa v. U.S.,*

385 US 293, 304 (1966), and *U.S. v. White,* 401 US 745, 752 (1971). Neither one of these cases involve the use of a telephone contrary to State law and without the consent, as required by California law, of the telephone company. (*People v. Treiber,* 28 Cal. 2d 657.) Neither *Hoffa* nor *White* involved the use of the telephone, nor did they require the consent of the telephone company under State law to use the telephone or to misuse the telephone.

We disagree with the Court's statement that under the facts of this case it makes no difference what telephone Durden was using. Under California law, Durden or any other subscriber is required to have the consent of the telephone company or its use was illegal. (*People v. Treiber,* 28 Cal. 2d 657.)

In the second place, Durden stood alongside of a narcotics officer and was virtually a dummy repeating the words of the narcotics officer. He was a Charlie McCarthy speaking for Edgar Bergen and conducting an inquiry which the narcotics agent himself could not do and that, we respectfully think, makes a reversible difference.

Furthermore, the telephone conversations only had half of the talk and was admittedly unclear without the other half being placed in the record.

Furthermore, the telephone conversations were mere recordings of past events and narrations of past events. They did not establish any conspiracy on the part of

either appellant or any participation in any alleged conspiracy.

The Court says "The double jeopardy argument was summarily rejected. It was not mentioned in the opinion, . . ."

There was only one indictment in this case, yet under the same indictment the defendants were placed on trial before two juries and two judgments rendered against them and two penalties imposed against them.

Defendants were obviously placed in jeopardy when they were placed on trial on the indictment.

Although when a man has done a criminal act the prosecutor may carve as large an offense out of the transaction as he can, yet he is not at liberty to cut but once.

A criminal offense cannot be split up and prosecuted in part without violating the rule of law "that a man shall not be twice vexed for one and the same cause."

A prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime. (*Jackson v. State,* 14 Ind. 327; *In re Neilsen,* 131 US 118-123.)

Where a person has been tried and convicted for a crime that has various elements included in it, he cannot be a second time tried for one of those elements

without being twice put in jeopardy for the same offense. (*Cane v. U.S.*, 19 F.2d 472, headnote 4.)

The Fifth Amendment entitled us to a ruling on the plea of once in jeopardy and not a summary dismissal. (*Ex parte Lange,* 18 Wall. (85 U.S.) 153, 21 L.ed. 872.)

The power of the Court was exhausted when the first sentence was pronounced on the same indictment and the second sentence was wholly without jurisdiction and in conflict with the Constitution. (Fifth Amendment; *Shepherd v. People,* 25 NY 406.)

In the 50 or more questions raised by us and on which the Court has not passed, we believe we raised the issue of whether search of the wire fastened trash bag in front of Leo Lovato's residence (R.T. 1198-1200, 1330-1331) resulted in the finding of a phone number, the handwriting of which was unidentified, and which was testified to as the phone number of one of the Butlers. Since filing our brief the case of *People v. Krivda,* 5 Cal.3rd 357; 8 Cal. (3) was decided by the Supreme Court of California in which a majority of the Court of California held that the placement of one's trash onto the sidewalk did not permit the search of the bags and that such a search was contrary to the Fourth Amendment of the Constitution of the United States and Article 1, Section 19 of the Constitution of California. The case was taken to the United States Supreme Court, which Court held that it was not clear whether California had acted under federal law or

under state law. The Supreme Court of California, in 8 Cal.3rd 623, held that it acted both under the Fourth Amendment and under Article 1, Section 19 for the California Constitution as an independent ground of State action and ordered the remittitur to issue forthwith. The effect of this decision is to hold that the search of the trash bag and the finding of the telephone number involved was an illegal search and seizure and the use of that evidence was use of fruit of the poisonous tree and fatally infected the verdict.

The Court has failed to certify, as required by *Chapman v. California,* 17 L.ed.2d 705, that none of the 50 or more errors cited as well as none of those reviewed on rehearing and again challenged above did not fatally infect the result beyond a reasonable doubt.

WHEREFORE, appellants pray for reconsideration and rehearing.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Appellants

APPENDIX "F"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ROBERT BUTLER, Defendant-Appellant.	)	No. 71-1029
ORDER		
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. TED DEAN BUTLER, Defendant-Appellant.	)	No. 71-1030

Before: BARNES, ELY and WALLACE, Circuit Judges.

The Clerk is directed to file the "Petition to Reconsider and Rehear Matters on Rehearing and Other Matters Overlooked in the Decision" which was lodged on behalf of Robert Butler and Ted Dean Butler.

IT IS ORDERED denied.

WALLACE
United States Circuit Judge